Supreme Court of the United States

OCTOBER TERM, 1952

No. 573

UNITED STATES OF AMERICA, PETITIONER,

vs.

LESTER PACKER, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinion Below

The opinion of the Court of Appeals [49-51][1] is not yet reported. The trial court made no findings of fact or conclusions of law. [46]

Jurisdiction

The judgment of the Court of Appeals was entered December 31, 1952. [51] The petition for writ of certiorari

[1] Figures appearing herein within brackets refer to pages of the printed Transcript of Record.

was filed January 29, 1953. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

Question Presented

Whether Section 6 (j) of the Selective Service Act of 1948, providing for investigation and appropriate inquiry, the Selective Service Regulations and the due-process clause of the Fifth Amendment required the hearing officer of the Department of Justice, upon the hearing of respondent's claim for classification as a conscientious objector, to make available to him, at or before the hearing, the secret police report concerning his conduct as a conscientious objector, and whether the use of secret evidence without divulging it to respondent in making the recommendation against his claim to the appeal board deprives respondent of his rights guaranteed by the act, the regulations and the Constitution.

Statement

In September of 1948 respondent registered with Selective Service Local Board No. 22, the Bronx, New York. A classification questionnaire was mailed to respondent, July 19, 1949. [13] It was returned by him on August 29, 1949. [13] The questionnaire showed his name and address. [53] It showed he had no previous military service. [54] It showed that he had never been married. [55] He worked at the millinery manufacturing concern of Glarys & Belle Inc. as a purchaser of supplies. [55] He showed that he had completed seven years of elementary schooling, three years of junior high school and was graduated from high school. In addition to this he showed that he had attended the City College of New York, taking a course of study in merchandising. [57] He is a United

States citizen, having been born at New York on April 4, 1929. [57]

Respondent failed to sign Series XIV of the questionnaire requesting the local board to send him a conscientious objector form. [13-14, 58]

On September 28, 1949, respondent was placed in Class I-A by his local board. [59] He neither appealed nor requested a personal appearance within the ten-day time limit fixed by the regulations. No further action was taken in his case by the local board until September 27, 1950, when he was ordered to report for a physical examination on October 4, 1950. He reported and was found physically acceptable. [14, 15, 59]

Sixteen days later the local board mailed him notice of classification (SSS Form No. 110), a card containing the usual notice. [14] On that same day, October 20, 1950, respondent requested a conscientious objector form. [15, 61] On October 23, 1950, the conscientious objector form was mailed to the registrant. [15, 59] On October 31, 1950, respondent returned the conscientious objector form properly filled out. [15, 59, 62-70]

He signed Series I (B) certifying that by reason of religious training and belief he was conscientiously opposed to participation in war in any form and that he objected to combatant and noncombatant military service. [62] He showed that he believed in a Supreme Being. [62, 64] He referred to his belief as a "code of morals" that may "very well stem from this Supreme Being". [64] He showed that his religious training in early years included a study and belief of the "ten commandments and religious prayer". [64] He stated that his belief he inherited as a part of his nature and stated that "it is a part of this Super Natural force". [65]

Respondent explained fully the nature of his beliefs, showing that they are based on the Bible. [66-68] He did, however, also cite incidentally a Chinese philosopher on human nature, stating that human nature was inherently

good and that if it remained good men would do no evil. He stated that the Chinese philosopher said "if men become evil it is not the fault of their original endowment". [65]

He further stated that "no man has the right to take the life of another human being regardless of circumstances. We are put on the earth by the will of God and by the will of God shall we depart". [68]

Respondent also gave references. He stated that he had never been a member of a military organization. He added that he was not a member "of a religious sect or organization". [69-70]

Two days after the conscientious objector form was received on November 2, 1950, the local board ordered that there would be no reopening of Packer's case. [15-16, 71] On November 7, 1950, Packer wrote a letter requesting a personal appearance or hearing out of time, in which letter he stated that he would welcome an F.B.I. investigation on his conscientious objector claim. [16, 71] The local board, on November 16, 1950, denied the request for hearing. [16, 72] The next day the local board ordered respondent to report for induction on December 5, 1950. [16-17, 59]

On November 22, 1950, Col. Cobb, New York City Director of Selective Service, called in Packer's file for review. [59] The City Director, on November 24, 1950, notified the local board that the mailing of the conscientious objector form to Packer and his returning it to the board should have reopened his case. The City Director informed the local board that they should have reclassified him and mailed him a new notice (SSS Form No. 110). The City Director, with a view to preserving the rights of respondent, ordered the local board to send the file to the appeal board. [17-18, 72-73] The local board ordered the induction of Packer postponed on December 5, 1950. [18, 59, 73]

On December 6, 1950, the local board and the appeal agent reviewed respondent's file. [18, 59] The next day the

file was sent to the appeal board. [18, 59] The appeal board on receipt of the file and review of it preliminarily denied the claim and referred the file to the Department of Justice for an appropriate inquiry and hearing on the conscientious objector claim. [18, 59, 74]

Four months later, on April 9, 1951, following the secret investigation conducted by the F.B.I., Packer was notified to appear before the hearing officer for an inquiry as to his conscientious objections. On April 9, 1951, respondent, on receipt of the notice and accompanying instructions, wrote the hearing officer a letter requesting to be provided with any unfavorable evidence. [18, 74-75] (The notice that the hearing officer mailed to the respondent invited him to request the hearing officer to provide the nature and character of any unfavorable evidence.) The hearing officer replied that he found no unfavorable evidence in the secret investigative report of the F.B.I. [43]

Respondent appeared before the hearing officer on May 7, 1951, the date fixed for the hearing. [40] The stenographic report made of the hearing showed that he informed the hearing officer that he went to a religious school until he was thirteen. Then he received his confirmation or his Bar Mitzvah. [44] He described his beliefs as the results of the Hebrew instruction received, that all humans are naturally good and that God is not only external but is also internal. [44] He stated that it is something "I have slowly developed within myself" and that it was basic in him. [45] As to his particular objections to participation in war he stated that he relied upon the commandment to love his neighbor and that he believed the commandment, "Thou shalt not kill." [45]

Respondent also informed the hearing officer that he would be willing, as a conscientious objector, to "assist in any welfare organization that the Government might establish, any humanitarian organization, rehabilitation work". He said: "I would be willing to give my service in anything that will be creative but not destructive." [46]

The hearing officer asked him if he would be willing to participate in noncombatant service in the army. He stated that he would not. [46]

The hearing officer inquired of Packer why it was that he did not certify that he was a conscientious objector in his questionnaire and waited a year to request the conscientious objector form. [45] He stated that at the time he filed the questionnaire he intended to claim the conscientious objector status. He added that his friends advised him that he might not pass his physical examination and that if he made a conscientious objector claim he would be looking for trouble from the board. He stated: "Not knowing the procedure of a conscientious objector and not realizing that my rights would expire after a certain time, I took this advice." [45]

The hearing officer stated that, since the board had allowed him to make his claim, "that part of it is all right." [45] The hearing officer received from Packer verification of his conscientious objector status signed by two witnesses. [19, 46] Upon receipt of these he said: "There is nothing derogatory to you, Mr. Packer, in the FBI report; there is nothing you have to meet, employment record is favorable and your friends and neighbors seem to confirm your attitude." [46]

The report of the hearing officer to the Department of Justice found that respondent believed in a Supreme Being and that he had been trained in the "Decalogue and religious prayer as well as moral training from his parents". [40] He reviewed the report of the F.B.I. briefly. [40, 41] He referred to the written statement produced by respondent supporting his conscientious objection at the hearing. [41] He referred to respondent's religious schooling and quoted respondent as saying: "I had never really gone along with the ritual of my religion." [41] He referred to the description by respondent of his religious views supporting conscientious objection. [41-42] He repeated the

explanation given by respondent of his delay in demanding the conscientious objector form. [42]

The hearing officer concluded that the Jewish religion was "not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form". [42]

He then added that he gave "no significance or weight to the fact that no statement of conscientious objection was made" in the questionnaire. The hearing officer said finally that respondent failed to establish that his objection "arises from religious training and belief". [42] He recommended that Packer be denied the conscientious objector claim and be placed in Class I-A. [42]

The Deputy Attorney General, on review of the draft board file, the secret F.B.I. report and the report of the hearing officer, recommended to the appeal board that respondent's claim as a conscientious objector be rejected because his beliefs "are based upon philosophical or sociological grounds or upon a person[al] moral code". [75] He added that he concurred in the recommendation of the hearing officer. [75]

On August 20, 1951, respondent was placed in Class I-A. [20, 76] He was notified of this classification on August 24, 1951. [21] An order to report for induction on September 14, 1951, was issued on August 30, 1951. [21] On that date respondent wrote a letter to General Hershey requesting a review of his file and an appeal to the President. [21, 76-78] On September 6, 1951, the local board wrote respondent that on August 30, 1951, they had reviewed his file again and again refused to reopen his case. [21, 78]

The City Director of New York, on September 6, 1951, wrote Packer that he refused to appeal the case to the President. [21, 79] On this same day the National Director, General Hershey, called the file in for review. [22, 80-81] Pending this review respondent was informed not to report for induction. [22] On September 14, 1951, his induction was postponed to October 16, 1951. [22] On October 2, 1951,

the National Director notified Packer that no action would be taken on his request for an appeal to the President. [82-83] On October 16, 1951, he reported for, but refused to submit to, induction, signing a statement certifying to his refusal. [23]

On November 19, 1951, by indictment in one count, he was charged with refusing to submit to induction. [1-2] Following a subpoena duces tecum issued by the respondent and he also made a motion to inspect the F.B.I. report. [2, 3-5] The Government moved to quash the subpoena duces tecum. [5-7] Respondent opposed the motion. [7-9] The motion to quash the subpoena was granted. [10] An order was made denying respondent the right to inspect the F.B.I. report before trial. [9]

Respondent waived the right of trial by jury. [10-11] Evidence was received. [10-34] Respondent was sentenced to the custody of the Attorney General for a period of four years. [39] Judgment and commitment was entered. [46] Respondent appealed. [47] The Court of Appeals reversed the conviction because of the failure to produce the F.B.I. report and make it a part of the administrative proceedings. [49] The judgment was reversed. [51] Petition for writ of certiorari in this Court was timely filed.

Argument

Respondent adopts the argument appearing in the Brief for Respondent in Opposition in No. 540, October Term, 1952, *United States* v. *Nugent*, the companion case to this case. That argument is made a part hereof by reference as though printed at length herein.—See pages 6-12 of that brief.

The Government emphasizes the point (on page 3 of the petition for writ of certiorari) that respondent failed to sign the blank in Series XIV of the classification questionnaire, requesting the board to mail him a special form for conscientious objector. It is stated that respondent did not

request the special form until October 20, 1950. (See page 3 of the petition.) To begin with, no weight ought to be given to this contention because it was argued in the Court of Appeals that respondent waived the claim because of these facts. This argument was rejected by the court below. [50-51] The Government has not assigned this holding as error: It has not presented this as one of its questions presented. The holding is binding on the Government and in the law of this case as far as that point is concerned. The holding of the court below on this point was in accordance with the administrative interpretation placed upon the regulations by the New York City Director. [17-18, 72-73]

Local Board Memorandum No. 41, issued by National Headquarters, Selective Service System, Washington, D. C., dated November 30, 1951, as amended August 15, 1952, in paragraph 2 states that "a registrant should be considered to have claimed conscientious objection to war if he has signed Series XIV of the classification questionnaire . . . , or if he has filed any other written statement claiming that he is a conscientious objector".

A holding similar to the holding of the court below on this point was made on June 26, 1952, by the United States District Court for the Western District of Pennsylvania. —See *United States* v. *Clark*, 105 F. Supp. 613.

The Government takes the position that the failure to produce the F.B.I. report either at or before the hearing and make it a part of the administrative papers in the case is harmless error because there was nothing in the secret investigative report of the F.B.I. that was adverse or unfavorable to respondent.

To this contention there are two answers. One is that reached by the court below, that it was for the respondent to determine whether there was anything unfavorable in the F.B.I. report. He should have judged for himself by reading the report. The court held that since he did not

have an opportunity to see and study it he could not perform that important function.

This Court must not assume that the F.B.I. report was favorable without seeing it. It is for the courts to determine after reading the report whether the contentions of the hearing officer were correct. The recommendation of the Deputy Attorney General indicates that the F.B.I. report must have been unfavorable or at least the report must have stated that respondent's belief was based on philosophical or sociological grounds. The report must have indicated that respondent based his conscientious objections on a personal moral code and not on his belief in a Supreme Being.

The hearing officer concluded that the respondent was not a conscientious objector because the Hebrew faith does not have, as a part of its belief, conscientious objections to war. [42] This conclusion was arbitrary and capricious. It is similar to that reached by another hearing officer, that a Catholic could not be a conscientious objector because the Catholic Church had no claim of pacifism. This conclusion was held to be arbitrary and capricious.—See *United States v. Everngam*, 102 F. Supp. 128 (D. C. W. Va. 1951).

An effort was made by respondent to offer evidence from a Jewish rabbi that the Hebrew faith makes room for conscientious objection to war. This testimony was excluded as immaterial.

The Deputy Attorney General, although concurring in the arbitrary and capricious recommendation of the hearing officer, concluded that respondent's belief was based on philosophical or sociological grounds and upon a personal moral code and ought, therefore, to be rejected, there being no support for a conclusion that respondent's belief was based on the Bible or belief in the Supreme Being. [75] The conclusion that the belief was philosophical or sociological or purely a personal moral code is without basis in fact. It flies in the teeth of all of the evidence given by the respondent, whose integrity and credibility were not im-

peached. It must, therefore, be assumed that the Deputy Attorney General relied upon the F.B.I. report to reach his conclusions. The use of and reliance upon the report without producing it and making it a part of the file so that respondent could read it harmed and injured respondent.

Let it be assumed, for the purpose of argument, that there is no unfavorable evidence in the F.B.I. report. The respondent is, nevertheless, harmed.

The failure to produce the F.B.I. report and make it a part of the administrative proceedings is itself a violation of the act and the regulations. The act and the regulations contemplate that facts discovered on the F.B.I. investigation shall be placed in the file. Without referring to the F.B.I. reports the Selective Service Regulations require that all facts and papers relating to a registrant's case should be included in the registrant's file.—See 32 C. F. R. §§ 1621.8, 1623.1 and 1626.24.

A report resulting from an investigation by the Department of Justice into the "character and good faith of the conscientious objections of the registrant" (32 C. F. R. § 1626.25 (c)) most certainly pertains to the registrant. This report also pertains to the registrant because it is used by the hearing officer to determine his recommendation of classification of the registrant.

Since the F.B.I. report should have been put into the registrant's cover sheet, it was subject to his inspection under the regulation that allows a registrant to see all papers in his file (32 C. F. R. § 1606.32 (a)), which reads, in part: "(a) Information contained in records in a registrant's file may be disclosed or furnished to, or examined by, the following persons, namely: (1) the registrant . . ."

The above regulation proves that the Selective Service System sees the intent of Congress to give a full and fair hearing.

Since the report of the F.B.I. was beneficial to respondent, it must be concluded that the evidence in the

report made by the Department of Justice was favorable to respondent's claim. The act and the regulations do not intend that the Department of Justice has the right to withhold from the administrative agency evidence developed by the investigation conducted by the F.B.I. Why would Congress provide for the uncovering of the facts and then permit the facts to be withheld from the administrative agency? The very asking of the question demands the plain answer that the evidence must be produced to the administrative agency by the Department of Justice. It is unreasonable to suppose that Congress intended to permit the investigation to be conducted and then have the facts hid from the administrative agency. Congress intended that the Department of Justice should serve and help the administrative agency to be fully informed under the act.

The fact that the evidence was favorable to respondent does not excuse the withholding of it from the appeal board. It was the obligation of the appeal board to make a fair and just determination. Respondent also has some rights along with the appeal board under the act. Congress intended that he should be fairly and justly classified. If there was evidence favorable or unfavorable to him, it was the duty of the Department of Justice to supply it to the administrative agency. It was for the appeal board to finally determine the claim. The appeal board could not fairly and justly classify respondent without having the benefit of the investigation conducted by the F.B.I.

If it is erroneous to withhold *unfavorable* evidence from the registrant, then it is all the more wrong for the Department of Justice to hold back *favorable* evidence from the appeal board. The purpose of Congress will be defeated if all or any of the facts of the investigation are withheld from the appeal board. No complaint whatever could be made about outside evidence not being placed in the file if it were not for the fact that Congress provided for the investigation and inquiry by the F.B.I. Since Con-

gress hired the Department of Justice to work for the appeal board in producing all of the facts on the conscientious objector claim, then it is the unequivocal duty of the Department of Justice to complete the job and deliver the goods, the report of the F.B.I.

The fact that respondent has the burden of sustaining his claim does not in any way excuse the Department of Justice from doing its job. If Congress intended to excuse the Department of Justice from investigating and conducting an appropriate inquiry solely because the conscientious objector had the burden of sustaining his claim, then Congress would have said so. It is the appeal board that was entitled to the information withheld from it. The withholding of the F.B.I. report harmed the appeal board. The harm suffered by the appeal board, in turn, injured respondent.

The rights of the registrant, incidental to the appropriate inquiry by the Department of Justice under the act, are not confined to seeing and answering *unfavorable* evidence. Since the act provided that the Department of Justice should turn up all of the facts to the appeal board, whether they were favorable or unfavorable, it was necessary that the report be made a part of the file.

Unless and until the report was put in the file, the procedure contemplated by Congress was not completed. Under the act and regulations respondent was entitled to have all of the favorable evidence placed in the file, as much as the respondent would have the right to be confronted with and answer any unfavorable evidence. The record was not complete since the Department of Justice deliberately tore out of the record a great part of the case. It was a gaping hole that vitiated the entire administrative process.

Respondent subpoenaed the F.B.I. report at the trial. The subpoena was quashed. The motion to inspect was denied. The Government must bear the responsibility for failing to produce material evidence. Failure to allow the courts to make use of the F.B.I. report in determining the

questions here presented gives rise to a presumption against the Government on its contentions.—See *United States* v. *Nugent*, 200 F. 2d 46 (2d Cir.).

The case here is similar to that of *United States* v. *Clare*, 108 F. Supp. 307 (S. D. N. Y. November 5, 1952) where (at the end of the opinion) the court held that the withholding of the F.B.I. report warranted the conclusion that the denial of the conscientious objector status was without basis in fact.

Conclusion

While the question presented is of national importance sufficient to warrant a decision by this Court, it is so obvious that the judgment of the court below is plainly right that, it is respectfully submitted, the petition for writ of certiorari should be denied.

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